

NO. A07-310

---

State of Minnesota  
*In Supreme Court*

---

City of West St. Paul,

*Appellant,*

vs.

Alice Jane Kregel,

*Respondent.*

---

**APPELLANT'S REPLY BRIEF**

---

JARDINE, LOGAN & O'BRIEN, P.L.L.P.  
Pierre N. Regnier (#90232)  
Susan Steffen Tice (#131131)  
8519 Eagle Point Boulevard, Suite 100  
Lake Elmo, MN 55042  
(651) 290-6500

*Attorneys for Appellant*

SOUTHERN MINNESOTA  
REGIONAL LEGAL SERVICES, INC.  
Julia Althoff (#307117)  
Michael Hagedorn (#39287)  
166 East Fourth Street, Suite 200  
Saint Paul, MN 55101  
(651) 222-5863

*Attorneys for Respondent*

**TABLE OF AUTHORITIES**

**Cases**

*Abrahamson v. Abrahamson*, 613 N.W.2d 418 (Minn. App. 2000) .....2

*American Tower L.P. v. City of Grant*, 636 N.W.2d 309 (Minn. 2001) .....2

**I. JUDICIAL CONSTRUCTION OF MINNESOTA'S PUBLIC NUISANCE STATUTE IS APPROPRIATE WHEN MORE THAN ONE REASONABLE INTERPRETATION IS POSSIBLE.**

Contrary to Respondent's position, the provisions of the Minnesota Public Nuisance Statute are anything but a "clear and simple" procedure for abating public nuisances. As readily apparent from a review of the procedural history of this matter, the statute's language is open to differing reasonable interpretations. When that occurs, the statute must be construed because if a statute's meaning is reasonably susceptible of more than one meaning, it is ambiguous. *Abrahamson v. Abrahamson*, 613 N.W.2d 418 (Minn. App. 2000); *American Tower, L.P. v. City of Grant*, 636 N.W.2d 309 (Minn. 2001).

Respondent admits that the procedural steps of the statute are required under the Public Nuisance Law in order to obtain a permanent injunction to abate a public nuisance. *See* Respondent's Brief, pp. 12-13. Respondent also concedes that each statutory section must be read in context, i.e. in light of the surrounding sections, in order to avoid conflicting interpretations. *Id.* at p. 14-15. Yet, Respondent's argument contradicts this mandatory procedural continuum and rule of statutory construction.

Under Minn. Stat. § 617.81, Subd. 1, a permanent injunction and temporary injunction, must comply with not only § 617.83 but all of § 617.80 to § 617.87. A permanent injunction under § 617.83 must be issued upon proof of a nuisance described in § 617.81, Subd. 2 which, in turn, defines a public nuisance to exist

upon proof of two or more separate behavioral instances “committed within the previous 12 months within the building”.

Likewise, under Minn. Stat. § 617.82(c), a temporary injunction must be issued upon proof of a nuisance described in § 617.81, Subd. 2 which, in turn, defines a public nuisance to exist upon proof of two or more separate behavioral instances “committed within the previous 12 months”.<sup>1</sup>

But before a prosecutor can even seek nuisance abatement, and before any temporary or permanent injunction hearing can be pled and scheduled, much less conducted, the prosecutor is REQUIRED to provide written notice which is, in turn, required to include a statement that a nuisance, again as defined by § 617.81, subd. 2, is maintained or permitted in the building and must also specify the kinds of nuisance being maintained or permitted.<sup>2</sup> Therefore, the notice must advise of what nuisances were “committed within the previous 12 months”.

---

<sup>1</sup> Respondent raises for the first time an argument regarding the District Court’s authority to close a building at the temporary injunction stage (See Respondent’s Brief, p. 13). Contrary to Respondent’s argument, there is nothing contained in the Public Nuisance Statute which precludes a District Court from issuing a temporary injunction order which closes a building. That is a discretionary call of the court. All the statute provides is that with the issuance of a permanent injunction, a court MUST order closure of the building.

<sup>2</sup> Respondent and the Court of Appeals hinge their statutory interpretation on the legislature’s use of present tense language in § 617.81 which identifies the acts constituting a nuisance and details the mandatory notice requirements. However, equally significant, is the language used in § 617.83 which allows issuance of a permanent injunction upon “proof a nuisance described in § 617.81, subd. 2”, not proof of an existing nuisance.

Reading these sections together and in context so as to avoid conflicting interpretations and keeping in mind that the initial required notice MUST identify the specific kinds of nuisances which are currently being permitted or maintained and which will ultimately be sought to be abated, and further considering that each subsequent mandatory procedural step can only occur and an injunction can only be issued upon “proof” of a nuisance described in § 617.81, subd. 2, this Court must construe the statute to reach the only reasonable conclusion. That conclusion is that the “within the previous 12 months language” which is an integral part of the Notice, must refer to the notice as required by Minn. Stat. § 617.81, subd. 4 and NOT the permanent injunction hearing.

Respondent maintains that the Court of Appeals correctly noted that a nuisance can only exist if it has not been abated or resolved by an abatement plan. *See* Respondent’s Brief, p. 16. In this case, the Abatement Plan was admittedly violated. It stands to reason, therefore, that if the Abatement Plan was violated, the nuisance was not “resolved” by the abatement plan. The only “date certain” in the entire Public Nuisance Statute and the only date over which a prosecutor has any control is the date upon which Notice is given, which happens to be the mandatory first procedural step in seeking nuisance abatement. Therefore, it is proper for a court to construe that the notice is the triggering event from which to measure “within the previous 12 months” statutory language.

**II. THE ABATEMENT PLAN WAS PROPERLY CRAFTED AND PROVIDED AUTHORITY FOR THE CITY'S ACTIONS.**

Respondent apparently contends that if the City prosecutor in this case had just exercised “proper planning” or “sound judgment” or had just been “craftier”, that she/he would “not be hampered by the requirement that the two instances of statutorily defined nuisance be proven to have occurred within 12 months of the permanent injunction hearing.” *See* Respondent’s Brief, p. 24. However, Respondent’s argument fails.

If the statutory phrase “within the previous 12 months” is interpreted to mean from the date of the hearing on the permanent injunction, the “crafty prosecutor” would have to be able to control the District Court’s calendar as to when the hearing on the permanent injunction would occur. Suppose a property owner engages in nuisance activity every 10 months (as suggested by Respondent’s Brief, p. 25). The required Notice of Injunctive Acton would be served after the second instance of nuisance activity. Another 30 days goes by, as required by the statute, before suit could be commenced and it is then 11 months from the date of the first of the two nuisance activities cited in the notice. Then a suit for injunctive relief is commenced. What is the chance of an Answer being interposed and a hearing on a permanent injunction occurring within one month of commencement of suit? Experience and acknowledgement of past practices says such a chance is virtually impossible.

Respondent acknowledges the authority a city prosecutor in establishing the terms of an abatement plan and concedes that as part of the plan a property owner can be required not to engage in behavior likely to perpetuate the continuation or reoccurrence of a statutory defined nuisance. *See* Respondent's Brief, p. 20. In addition, Respondent concedes that as part of the agreement the City has the power to retain discretion to determine when a legal action may be initiated to enjoin the nuisance activity. *Id.* That is exactly what the City did in this case.<sup>3</sup>

The Abatement Plan agreed to by Respondent provided that "any violation of the terms and conditions of the Abatement Plan will allow the City Council to pursue injunctive action as stated in the Notice of Injunctive Actions." When Respondent admittedly violated the terms of the Abatement Plan, the City did just what she and the City had agreed to – the City Council pursued the injunctive action as stated in the Notice of Injunctive Action.<sup>4</sup>

Respondent maintains that the District Court erred by not identifying any specific nuisances maintained or permitted within the 12 months prior to the permanent injunction hearing. *See* Respondent's Brief, p. 8. However, that was not required since Respondent had previously agreed that the City could proceed to seek an injunction based upon the specific instances of nuisance activity "as

---

<sup>3</sup> While acknowledging the authority given to a prosecutor by the Public Nuisance Statute, Respondent simultaneously argues that this Court must restrict what an abatement plan or Injunction Order may include. *See* Respondent's Brief, p. 22.

<sup>4</sup> The Notice of Injunctive Action referred to in the Abatement Plan necessarily is the July 29, 2005 Notice which detailed 13 separate instances that constituted acts of maintaining or permitting a public nuisance which occurred between September 28, 2004 and July 12, 2005 because that is the only Notice of Injunctive Action at the time the Abatement Agreement was entered into. It is also the Notice of Injunctive Action which includes separate instances of nuisance activity which Respondents claims are "stale".

stated in the Notice of Injunctive Action” which was dated July 29, 2005. When the Abatement Plan has been violated and the Plan provides that the City can seek injunctive relief based upon any violation, the Court may properly issue a permanent injunction even without new nuisance activity. There is no Statute of Limitations contained in the Public Nuisance Statute limiting when a permanent injunction can be sought and it is improper for Respondent to urge this Court to read such a limitation into the Abatement Plan when none exists. Respondent agreed that the City could pursue injunctive action based upon the Notice (July 2005) upon her non-compliance. The City timely did so. Contrary to Respondent’s argument, the City did not improperly seek to obtain a permanent injunction based on her behaviors which did not constitute statutorily defined nuisance activity. *See* Respondent’s Brief, p. 21-22. The City did so based upon Respondent’s own agreement which allowed it to seek an injunction based upon the Notice of Injunctive Action upon her violation of the Abatement Plan.

The City proved violations of the Abatement Plan terms and violations of the Nuisance Statute because it proved the violations as included in the Notice of Injunctive Action.

In spite of the sound judgment and proper planning executed by the City prosecutor in drafting the Abatement Plan in this case, and in spite of the acknowledged authority of a prosecutor in establishing the Abatement Agreement terms, the decision rendered by the Court of Appeals improperly eliminates the possibility of an abatement plan which includes the contract language agreed to by

the parties in this case. The City acknowledges the options available to it under the Public Nuisance Statute, however, Respondent misses the point. The decision of the Appellate Court, for the most part, precludes the use of one option – namely an abatement plan which includes the language utilized by the parties in this case.

**III. RESPONDENT INCORRECTLY INTERPRETS THE STATUTE AND IGNORES THE NOTICE REQUIRED BY MINN. STAT. § 617.81, SUBD. 4**

In an attempt to convince this Court that the Public Nuisance Statute is clear and unambiguous and that the phrase “within the previous 12 months” could ONLY mean within the 12 months previous to the permanent injunction hearing, and in a further attempt to convince that a City prosecutor will succeed in obtaining a permanent injunction as long as proof is made of two instances of nuisance behavior within the 12 months preceding the permanent injunction hearing, Respondent ignores the notice requirement found in Minn. Stat. § 617.81, subd. 4.

Respondent incorrectly maintains that either the Notice of Injunctive Action OR more current behavioral incidents may be the basis for filing a nuisance action. *See* Respondent’s Brief, p. 17. That is contrary to the statute.

The Public Nuisance Statute is ambiguous for the very reason that it fails to differentiate between nuisance activity identified in the Notice and other, more recent, nuisance activity. Respondent incorrectly maintains that the statute allows that any nuisance activity which can be proven to have occurred within 12 months of the permanent injunction hearing may be the basis for relief authorized by §

617.83. *Id.* Respondent is equally incorrect to maintain that if more current nuisance activity can be proven to have occurred within the 12 month period, the permanent injunction relief described in § 617.83 may also be based on such activity. *Id.*

The fatal flaw in Respondent's argument in this regard is that it fails to take into account the requirement that issuance of a Notice of Injunctive Action, pursuant to Minn. Stat. § 617.81, subd. 4 is THE triggering event to the entire statutory scheme contained in the Public Nuisance Statute. Nothing can happen to seek abatement until such notice, which MUST include identification of the specific kind(s) of nuisance being maintained is provided. The purpose of the notice is plain. It is to give notice to the recipient of the specific kinds of nuisance conduct which must be stopped. The requirement of the notice is, likewise, plain. It provides adequate due process to the recipient. Therefore, if subsequent, new acts of statutorily defined nuisance activity occur which, necessarily, were NOT included in the Notice, the purpose and requirement of the Notice are not achieved and the statute prohibits the City from seeking injunctive action based upon those new nuisance activities without just complying with all the procedural steps set forth in the statute – including notice and a 30 day waiting period. The City must begin the process anew each time by providing a new Notice of Injunctive Action. Therefore, the interpretation as to when the “within the previous 12 months” language applies remains significant to prosecutors and, will, indeed, have a statewide negative impact should the Court of Appeals interpretation stand.

**IV. THE COURT OF APPEALS' DECISION IGNORES THE CLEAR IMPLICATION OF THE LANGUAGE FOUND IN MINN. STAT. § 617.82(a) WHEN ABATEMENT PLAN NON-COMPLIANCE OCCURS.**

Minn. Stat. § 617.82(a) provided Respondent with two choices regarding the nuisance activity stated in the Notice required by Minn. Stat. § 617.81, subd. 4. Respondent could have either abated the nuisance or entered into and complied with an abatement plan within the stipulated time period. Respondent chose the latter but then did not comply with the abatement plan.

Minn. Stat. § 617.82(a) clearly provides that if the notice recipient complies with the abatement plan, the prosecutor may not proceed to file a nuisance action based on the nuisance activity described in the notice. The necessary corollary is that if the recipient of the notice fails, as here, to comply with the abatement plan, the prosecutor may then file a nuisance action “regarding the nuisance activity described in the notice.” § 617.82(a) Both Respondent and the Court of Appeals completely ignore the clear implication found in the language of § 617.82(a) when abatement plan non-compliance exists.

When Respondent failed to comply with the Abatement Plan, by the agreement she authorized the City to proceed with injunctive action. § 617.82(a), in turn, clearly implies that the prosecutor may then proceed to file a nuisance action “regarding the nuisance activity described in the notice”. (emphasis added) The statute does not say that the prosecutor may proceed “regarding any nuisance

activity occurring within the 12 months preceding the filing of the nuisance action.”

Though the statute may not contain a specific provision for staying or tolling the statutory procedures while an abatement plan is in force, it is error to not acknowledge that tolling is the practical effect achieved by the Legislature’s intent, as implied by Minn. Stat. § 617.82(a). The City is not requesting that this Court “imply” a tolling provision or “read” into the statute such a provision or to expand its authority to regulate nuisances beyond that which is permitted by the statute. Consistent with Respondent’s plea for this Court to “apply” the law, the City merely seeks acknowledgment that the application of the law in a case where abatement plan non-compliance occurs results in the tolling of abatement enforcement steps, including the language “within the previous 12 months”, while the parties proceed in good faith to pursue the arrangement they have contracted to follow in light of the Legislature’s choice and use of language in Minn. Stat. § 617.82(a).

### **CONCLUSION**

Under the Court of Appeals decision, and its interpretation of the “within the previous 12 months” language, the Minnesota Public Nuisance Statute is unworkable and ignores the intent and meaning of the statute. In order for the Legislature’s intent to remain unthwarted, the term must be interpreted to only refer to the 12 months immediately preceding the Notice of Injunctive Action required by Minn. Stat. § 617.82, subd. 4. Or, at the very least, this Court should

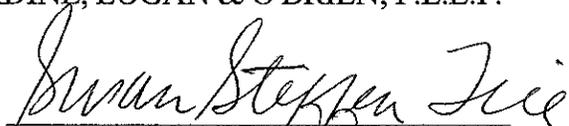
rule that the result reached by the District Court was in accord with the terms of the Abatement Plan. The Court of Appeals wrongly thwarted the terms of the Abatement Plan by misconstruing the Public Nuisance Statute. The Public Nuisance Statute does not restrict the terms of an abatement plan. The Court of Appeals' decision improperly restricts the terms of the abatement plan. The Court of Appeals decision should be reversed.

Dated: 9/22/08

Respectively submitted,

JARDINE, LOGAN & O'BRIEN, P.L.L.P.

By:

  
PIERRE N. REGNIER (A.R. #90232)

SUSAN STEFFEN TICE (A.R. #131131)

8519 Eagle Point Boulevard, Suite 100  
Lake Elmo, MN 55042-8624  
(651) 290-6500

ATTORNEY FOR APPELLANT